

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 640 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

HEIRS OF DECD. GHANCHI KASAM HASAN ALAD

Versus

HEIRS OF DECD. MUSA IBRAHIM KHALIFA

Appearance:

MR SURESH M SHAH for Petitioners
MS SEJAL K MANDAVIA for Respondent No. 1
Mr B P Dalal for Respondent No. 2

CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 12/02/99

ORAL JUDGEMENT

This Court, by order dated 16.4.98 issued notice as to why this application be not admitted and allowed, returnable on 16.6.1998. The respondent has put in appearance after service. As such the matter is taken up for final hearing today.

2. The plaintiff filed suit for specific performance

as back as in the year 1968 which was decreed in Second Appeal by judgment and decree dated 11.8.1978. The matter was unsuccessfully carried by the defendants to the Supreme Court. In compliance of the decree, sale deed was executed. The plaintiff-decree holder, thereafter filed application under Order 21 Rule 35 of C.P.C. for issuing possession warrant. The defendant judgment-debtor raised certain objections to the effect that the land is not separable and as such separate and distinct possession cannot be delivered to the plaintiff decree-holder. Considering the contentions of the parties, the learned Civil Judge (JD), Mangrol, by order dated 30.9.1997, in accordance with the provisions of Section 54 of C.P.C. sent the decree to the Collector to separate land of 3 1/2 bighas from the land bearing survey No.724 of Mangrol from the Northern side. The petitioner filed review application which was rejected by order dated 21.3.1998. By the present Revision Application, the petitioner has challenged the legality of the order dated 30.9.1997 passed below Exh.46 and also the order dated 21.3.1998 passed below Exh.48. Mr B P Dalal, learned Advocate appearing for the respondent No.2 has raised objection that the present Revision is barred by limitation, inasmuch as limitation is to be computed from the date of the impugned order i.e. 30.9.1997 and not from the date of rejection of the review application. Mr Dalal further submits that even the review application was barred by limitation. The time spent in perusing the remedy of review is to be excluded under the provisions of section 14 of the Limitation Act. Thus, the Revision Application is within limitation and the objection of Mr Dalal is rejected.

3. Mr S M Shah, learned Advocate appearing for the petitioner submits that the controversy as to whether the subject land is distinct and separate has been settled by this Court in Second Appeal. The learned Advocate has invited my attention to para 10 of the judgment dated 11.8.1978 in Second Appeal No.619/73. A reading of the judgment shows that same controversy was raised before the High Court which was answered in para 10 as under:

"I say that these two pieces were existing as separate entities because in the year 1962, the defendant No.1 had mortgaged this suit part with possession with the plaintiff and this separate part maintained its independent unity all throughout."

It appears that the said controversy was again sought to be raised before the Supreme Court by the judgment debtor

in Civil Appeal No.1274/79, but it was rejected on the ground that no map of the land in dispute was shown on the basis of which the Apex Court could have appreciated the controversy. The order of the Apex Court dated 22.8.1995 is extracted as under:

"In the absence of a map of the land in dispute showing its situation vis-a-vis iother holdings of the parties, it is difficult to appreciate the contentions of the appellant in view of the findings recorded by the High Court. We have critically examined the basis of the judgement under appeal and are of the view that the High Court has based its decision on correct premise. We, therefore, dismissed this appeal."

In view of the clear finding of this Court in Second Appeal No.619/73 and confirmed by the Apex Court, the learned Civil Judge (JD), Mangrol has committed material illegality in exercise of jurisdiction in considering that the suit land is not distinct and separate. The learned Judge has failed to correct the error apparent in spite of bringing the fact to the notice by way of filing review application. In this circumstance, the direction given by the learned Judge to the Collector to separate the suit land is illegal and erroneous.

4. In view of the aforesaid, this Revision Application is allowed. The order dated 30.9.1997 passed by the Civil Judge (JD), Mangrol and the order dated 21.3.1998 passed in the review application are quashed and set aside.

Rule made absolute accordingly. Direct Service is permitted.

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msp.